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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SCOTT EDWARD CABRAL,<br><br>Defendant and Appellant. | C060729<br><br>(Super. Ct. No. 07-3458901) |

Defendant Scott Edward Cabral was charged with manufacturing hashish (count 1; Health & Saf. Code, § 11379.6, subd. (a)), felony child endangerment (count 2; Pen. Code, § 273a, subd. (a) [undesignated statutory references that follow are to the Penal Code]), and misdemeanor contributing to the delinquency of a minor (count 3; § 272, subd. (a)(1)). Counts 1 and 2 were both alleged to have occurred on or about March 26, 2007; count 3 was alleged to have occurred on or about April 6, 2007. A jury convicted defendant on all counts.

The trial court sentenced defendant to a state prison term of six years four months, consisting of the five-year midterm on

count 1 plus one-third the midterm consecutive (16 months) on count 2, with a 150-day jail sentence on count 3 to run concurrently to the sentences on counts 1 and 2.

Defendant contends the trial court erred by denying his motion to stay sentence on count 2 under section 654 because the acts supporting that count were the same as those that supported count 1. We order defendant's sentence on count 2 to be stayed pursuant to the provisions of section 654. In all other respects, we affirm the judgment.

## FACTS AND PROCEEDINGS

Around 3:30 p.m. on March 26, 2007, Victoria B., in her home in Portola, California, felt an explosion. Looking out her kitchen window, she saw flames inside defendant's house. She called 911.

Victoria B. saw a man walk out of a side door of the house, carrying something that was engulfed in flames; he put the item down by the fence. Running to the house, Victoria B. saw a man and a boy inside and flames coming from the kitchen. She went in and told the boy he had to leave; he went outside.

In the kitchen, Victoria B. saw two other men. The cabinets were smoking, the melted microwave was pushed out from the wall, and the stove (with its back on fire) appeared to have been blown away from the wall. Victoria B. smelled a strong acrid chemical odor.

Defendant, in the kitchen, introduced himself to Victoria B., saying it was his house. She told him she had called 911.

The men started to pick up Pyrex pans with charred remains, saying they needed to get them out of the house; defendant gave a blackened pan to a man whose beard and arm hair were singed. Defendant declined Victoria B.'s offer to administer first aid to the burned man and told her she could leave.

Outside, Victoria B. heard defendant say to a man that they needed to get rid of a pan with burnt residue. She again was told to leave.

As Victoria B. started to go, a deputy walked through the gate. Someone stopped him from entering the house, telling him things were under control. He and Victoria B. left.

Around 3:45 p.m., Eastern Plumas County Rural Fire Department Captain Timothy Waller responded to a house fire call. It had been canceled by the time he and his crew arrived, but he saw smoke in the eaves and attic vents. He went to the front door, where defendant told him to leave. Seeing smoke in the kitchen, Captain Waller told defendant he wanted to check the attic.

When defendant's girlfriend, Amity R., arrived, Captain Waller told her his team needed access to the attic. After checking inside with defendant, Amity told them he had given permission to go up there. The crew did not find fire in the attic, but Captain Waller observed smoke damage on the walls and something plastic melting above the stove. There had evidently been a flash fire in the kitchen, possibly of chemical origins, which produced a great deal of heat. Defendant and his friend seemed anxious.

Defendant's son B., aged 12 at the time of the fire, lived with defendant, Amity R., B.'s 16- or 17-year-old sister S., and J.S., a male who shared a room with S. According to B.'s testimony, he was heading home from school when the fire broke out; he did not recall telling a detective that he was in the house at the time.

On April 6, 2007, Plumas County Sheriff's Commander Gerald Hendrick served a search warrant at defendant's house. Commander Hendrick and his fellow officers were searching for a methamphetamine laboratory, but did not find any signs of one. However, they did find 71 butane canisters inside a large cardboard box in a crawl space under the house.

The officers also found marijuana, some of it in the kitchen, where the front of the dishwasher was melted and the side of the refrigerator showed fire damage. In addition, they found what appeared to be a current medical marijuana recommendation in defendant's name.

Defendant, who was present during the search, told the officers that a rag had caught fire on the stove, causing Pam spray cans to explode. He claimed the butane was for his radio-controlled cars. However, there were no such cars in the house, and an expert testified that butane is not used with any radio-controlled products.

A criminalist testified that hashish, or marijuana oil, can be processed from fresh marijuana by pouring butane through a PVC pipe stuffed with marijuana and into a large pan. As the liquid butane evaporates, it gives off flammable fumes; if the

process is done inside, a pilot light or a cigarette can ignite the fumes, causing a fire and a loud explosion. Any butane left in the pan would be on fire.

A narcotics investigator who was present during the service of the search warrant at defendant's house opined that the explosion and fire resulted from an attempt to manufacture hashish.

A sheriff's deputy who was part of the search team questioned B. during the search and taped the interview. The tape showed that B. said he was at home, waiting for his father with another man, when the fire started, and that his father was not there when it started but helped to put it out.

The prosecutor repeatedly told the jury in closing argument that count 2, the child endangerment count, was based entirely on defendant's act of manufacturing hashish on March 26, 2007, with B. in the house. He never suggested that the jury consider the prior storage of butane in the house in connection with count 2.

## DISCUSSION

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

At sentencing, defendant argued that sentence on count 2 had to be stayed pursuant to section 654 because count 2 was

based on the same acts as count 1. The trial court denied the motion for the following reasons: "[T]he Court does find that there is not a problem with respect to sentencing on both matters, that the manufacture of the illegal substance could have taken place with or without the presence of a small child. The fact that you did that during the time the child was in the house certainly did cause an independent and second count to arise and appropriately convicted of that violation [*sic*]." Defendant contends this ruling was error. We agree.

The fact that defendant could have manufactured hashish without simultaneously endangering his child explains why his act was punishable in different ways by different provisions of law. But it does not explain why that act could properly be punished under more than one provision.

The People offer two rationales for finding that section 654 does not apply, but both fail.

The People assert that defendant's act of child endangerment had a separate intent and objective from his act of manufacturing hashish: he intended not only to manufacture but also to expose others in the house to the risks caused by his manufacturing. It is true that section 654 does not apply when a defendant's course of criminal conduct involves separate intents and objectives. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208-1212.) But this is not such a case as to counts 1 and 2. Even assuming that defendant intended to expose others in the house to the risks of manufacturing, there is no evidence he knew B. was in the house. Thus, there was no evidence he

intended to expose B. to those risks. Furthermore, as the jury was instructed, the mental state required under count 2 was criminal negligence--i.e, reckless conduct that creates a high risk of death or great bodily harm, whether or not the actor intended to create that risk. Thus, the jury could have convicted defendant on count 2 without finding that he intended to expose B. to risk.

The People rely on *People v. Braz* (1997) 57 Cal.App.4th 1, where the defendant was properly sentenced to separate terms under section 273a because she first physically abused a minor, then failed to seek medical help for him. Their reliance is misplaced. In *Braz,* not only did the defendant's acts occur separately in time, but the failure to seek help had the intent of avoiding detection for the prior abuse, a clearly separate objective. (57 Cal.App.4th at pp. 11-12.) *Braz* is therefore inapposite.

The People also assert: "Multiple acts of violence committed against separate victims may be punished separately, even when they are done with the same intent and during the same transaction. (*People v. Perez* [1979] 23 Cal.3d 545, 553.)" This principle of law also does not apply to these facts. Counts 1 and 2 did not allege "[m]ultiple acts of violence committed against separate victims" and the jury's verdict on those counts did not entail such a finding. The fact that one might colloquially call the inadvertent result of defendant's conduct a "violent explosion" does not turn the crime of

manufacturing hashish into an "act of violence," as the People claim.

The People also rely on *People v. Pantoja* (2004) 122 Cal.App.4th 1. In *Pantoja,* the Court of Appeal held that, where defendant killed his girlfriend in the presence of their daughter and was convicted of murder and child endangerment, defendant was properly sentenced to separate terms. The court, relying on the proposition that one violent act that has two results, each of which is an act of violence against separate individuals may be punished separately, held that the violent act of murdering the child's mother was likely also to cause harm to the child. Separate punishment under those circumstances did not violate section 654. (*Id.* at pp. 11-12.)

In this matter there was no violent act against one individual which harmed or was likely to harm another. There was a single act of criminal negligence as to the child that resulted solely from defendant's efforts to manufacture hashish. That is not the same as doing violence to one person and at the same time doing violence to another.

The People finally assert that we must affirm the sentence "to insure [*sic*] [defendant] is punished commensurate with his criminal liability" because his act of manufacturing endangered his child. This might be an argument for imposing the upper term on count 1, but it is not an argument for refusing to stay the sentence on count 2 when required to do so under the provisions of section 654.

A sentence imposed in violation of section 654 is unauthorized. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Under our authority to correct an unauthorized sentence (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534), we shall strike defendant's sentence on count 2 and direct the trial court to prepare a corrected abstract of judgment reflecting the reduced sentence.

In light of the above, we need not consider defendant's argument, raised in supplemental briefing, that the trial court's sentence violated his constitutional liberty interest in being sentenced correctly according to state law.

## DISPOSITION

Defendant's sentence on count 2 is ordered stayed pending completion of defendant's sentence on count 1. The matter is remanded to the trial court with directions to prepare a corrected abstract of judgment in accordance with this opinion. In all other respects, the judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.